

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

JAN. 19,99

Paper No. 17
DEB

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Britches of Georgetowne, Inc.
v.
Kinder Britches Incorporated

Opposition No. 103,150
to application Serial No. 74/657,452
filed on April 7, 1995

Simor L. Moskowitz and Andrew J. Gray, IV, of Jacobson Price
Holman & Stern, PLLC, for Britches of Georgetowne, Inc.

Edward L. Tezak of Zackery Legal Group for Kinder Britches
Incorporated.

Before Hairston, Wendel and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Britches of Georgetowne, Inc. (opposer) has opposed the
application of Kinder Britches Incorporated (applicant) to
register the mark "KINDER BRITCHES and design" as shown

below for a "retail store for children's apparel and accessories."¹



In the notice of opposition, opposer asserts that for many years it has been engaged in the operation of retail clothing stores, and the distribution, sale, marketing and promotion of related clothing products under the marks BRITCHES OF GEORGETOWNE, BRITCHES GREAT OUTDOORS and BRITCHES. More particularly, opposer asserts that it has used "BRITCHES" marks since at least as early as 1968 and alleges ownership of four federal, incontestable registrations of composite marks featuring BRITCHES. Opposer asserts that it has extensively advertised and promoted its products under these marks by way of catalogs, store signage and displays, shopping bags, product packaging and clothing labels.

Opposer alleges that applicant's mark so resembles opposer's marks as to be likely to cause confusion, to cause

¹ Serial No. 74/657,452 alleging use since August 12, 1993. In September 1995, in response to the first Office action, applicant disclaimed the words "KINDER BRITCHES" apart from the mark as shown. Then in an Examiner's Amendment in January 1996, the requirement that the word "KINDER" be disclaimed was withdrawn and applicant agreed to disclaim the word "BRITCHES" alone.

mistake or to deceive. Applicant, in its answer, has denied the essential allegations of the notice of opposition.

Opposer has submitted a notice of reliance upon applicant's "Answers to Opposer's First Set of Interrogatories" and copies of opposer's advertisements from a variety of printed publications, and its four pleaded registrations. Opposer, with its notice of reliance, also introduced the status and title copies of opposer's four pleaded registrations.

Opposer has also made of record a testimony deposition with exhibits. Applicant has taken no testimony and has submitted no other evidence. Both parties have submitted briefs, but no oral hearing was requested.

Opposer relies upon the following registrations:

(1) "BRITCHES and design" in the form shown below for a long list of clothing items and retail clothing store services:



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² Reg. No. 1,268,646, issued on February 28, 1984 from an application filed on June 5, 1981, which sets forth dates of first use of October 1968; §8 affidavit accepted and §15 affidavit received.

(2) "BRITCHES GREAT OUTDOORS and design" as shown below for backpacks and a long listing of men's and women's clothing:



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(3) "BRITCHES OF GEORGETOWNE and design" as shown below for clothing items and retail clothing store services:



4 and,

(4) "BRITCHES GREAT OUTDOORS and design" as shown below for retail clothing store services:



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³ Reg. No. 1,249,846 issued on August 30, 1983 from an application filed on February 26, 1981, which sets forth a date of first use in April 1976 and first use in commerce in June 1976; §8 affidavit accepted and §15 affidavit received.

⁴ Reg. No. 1,263,661 issued on June 10, 1984 from an application filed on June 5, 1981, which sets forth dates of

Opposer took the testimony of Ms. Linda Gay, Opposer's Vice President of Production and Sourcing (along with exhibits). Opposer began use of the BRITCHES and BRITCHES OF GEORGETOWNE marks in October 1968 and the BRITCHES GREAT OUTDOORS marks in April 1976.

According to Ms. Gay, Opposer is a retail establishment having three separate divisions (Deposition Testimony of Ms. Linda Gay, p. 8). Although opposer's predecessor in interest, Canterbury Tales, Inc., began using the "Britches" label in 1968,⁶ around 1978, Britches of Georgetowne, opposer's tailored clothing division, began manufacturing its own products (Deposition Testimony of Ms. Linda Gay, p. 7). The advertisements stress that these fourteen "Britches of Georgetowne" stores (Deposition Testimony of Ms. Linda Gay, p. 9) represent a tradition of fine clothiers selling luxurious suits and shirts of extraordinary quality for professionals, businessmen, and the like (Deposition Testimony of Ms. Linda Gay, p. 10; Deposition Exhibits 8c & 8d; Opposer's Exhibits 10, 13, 15 & 17).

Opposer's second and largest division, Britches Great Outdoors, focuses on active sportswear and now has ninety-

first use of October 1968; §8 affidavit accepted and §15 affidavit received.

⁵ Reg. No. 1,222,967 issued on January 4, 1983 from an application filed on February 26, 1981, which sets forth a date of first use in April 1976 and first use in commerce in June 1976; §8 affidavit accepted and §15 affidavit received.

three stores nationwide (Deposition Testimony of Ms. Linda Gay, p. 9). The target audience for Britches Great Outdoors comprises students and young adults ranging from teen-agers to those "thirty-somethings" looking for casual, weekend or outdoor clothing (Deposition Testimony of Ms. Linda Gay, pp. 11-14).

The third and newest division comprises nineteen Britches Factory Stores (Deposition Testimony of Ms. Linda Gay, p. 9). This division is a recent spin-off of Britches Great Outdoors, and sells many of the same goods as Britches Great Outdoors but to factory outlet customers at lower price-points (Deposition Testimony of Ms. Linda Gay, pp. 14-15). The shopping bags for the outlet stores have a large letter "B" enclosed within a circle, and have the word "BRITCHES" in block letters below the circle (Deposition Exhibit 13d).

While opposer got its start in the Washington DC metropolitan area, it now has outlets in twenty-seven states and the District of Columbia (Deposition Testimony of Ms. Linda Gay, p. 10). Within the past year or so, opposer has opened stores in California and has plans for other locations in the Pacific Northwest (Deposition Testimony of Ms. Linda Gay, p. 10). At various times opposer has

⁶ "BRITCHES and design" (Reg. No. 1,268,646), and "BRITCHES OF GEORGETOWNE and design" (Reg. No. 1,263,661) *supra*.

marketed collections of children's clothing,⁷ has engaged in gift mail order services (Deposition Testimony of Ms. Linda Gay, pp. 16,20), and conducted nationwide advertising to mailing lists and in national publications like "Gentleman's Quarterly" (Deposition Testimony of Ms. Linda Gay, p. 37).

The sole issue for our resolution is likelihood of confusion. Priority is not in issue with respect to the marks and goods/services shown therein in view of opposer's valid and subsisting registrations. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Even without the pleaded registrations, opposer's priority is clear from the testimony of Ms. Gay and the exhibits of record.

In the course of rendering this decision, we have followed the guidance of In re E.I. duPont deNemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.

⁷ See exchange with opposer's counsel taken from Ms. Linda Gay's Deposition Testimony of September 3, 1997, at pp. 13-14:

Q: [opposer's counsel] Has Britches ever sold any children's' or kids' clothes?

A. [Opposer's vice president] We sold a collection a number of years ago that was called JV. It was more geared towards boys. It was from sizes 8, 10 and 12...

Q: When might that have been?

A: It was about six or seven years ago, 1991, '92.

Q: Okay. Are there any current plans to resume children's' clothes?

It is opposer's position that applicant's mark "KINDER BRITCHES and design" so closely resembles its BRITCHES marks that confusion is likely.

Applicant, on the other hand, maintains that there is no likelihood of confusion because the marks in their entirety are quite different, and that the only common term, "Britches," is a weak mark in the clothing field.

As described by the parties, the services are quite closely related. Both parties are in the retail clothing business. Although applicant's services are expressly limited to children's clothing, opposer's services are not at all limited. The issue of likelihood of confusion must be determined on the basis of the services as identified in the involved application and registrations. Accordingly, opposer's services must be interpreted as including retail clothing store services for children. In re Elbaum, 211 USPQ 639 (TTAB 1981). It is common knowledge, based upon everyday experience, that items of apparel for men, women and children are often sold in the same stores. Irrespective of age or gender, clothing items are customarily sold at retail through traditional retail outlets, in shopping malls, etc., similar to those operated by opposer, as well as through mail order, departments

A: There are current conversations ... in regards to reintroducing kids' clothes...

stores and clothing specialty shops. Because apparel retail stores serve as a channel of trade for men's, women's and children's clothing, the classes of actual and potential purchasers for the goods sold through the providers of such services would necessarily be identical.

Even in opposer's stores selling only men's clothing, there would still be an overlap in the class of prospective purchasers with applicant's children's clothing stores. For example, women who are wives and mothers would shop for clothing for members of their family in both locations. Furthermore, in reality, the smaller sizes of adult clothing found in a Britches Great Outdoors store are currently quite popular with older children and adolescents (Deposition Testimony of Ms. Linda Gay, p. 12-13). Also, Britches of Georgetowne has occasionally had clothing collections in its stores specifically geared to younger boys (Deposition Testimony of Ms. Linda Gay, p. 13-14).

Based on the above, if a retail store specializing in children's apparel were to market such items of clothing under the same or a substantially similar mark as that used in connection with opposer's goods and services, confusion as to the source or sponsorship thereof would be likely to occur.

In turning now to a closer examination of the parties' respective marks, we agree with applicant that we must

compare the composite marks in their entireties.

Furthermore, applicant argues that the "word 'britches' is weak in that it is generic, descriptive or highly suggestive of the goods/services" (Applicant's brief, p. 2).

By virtue of its long and extensive use of an admittedly highly suggestive (if not descriptive) designation, opposer argues this term has acquired distinctiveness as a source identifier and is relatively well known nation-wide in the clothing field. This position may well explain why in the two previous registrations owned by Canterbury Tales, Inc. (Applicant's brief, p. 2, exhibits B & C)⁸, opposer's predecessor disclaimed the term "Britches" in 1971-1972. On the other hand, the four pleaded registrations, which issued a dozen years later under Section 2(f), reflect this acquired distinctiveness.

Although the record shows several marks in third-party registrations incorporating the word "Britches," the record does not suggest to us that the mark is at all diluted in this field -- and especially since there is no evidence of actual third-party usage, or any third-party registrations for clothing or retail services where the word "Britches"

⁸ "BRITCHES OF GEORGETOWNE and design," Reg. No. 942,463, issued September 5, 1972; and "BRITCHES OF GEORGETOWNE and design," Reg. No. 942,838, issued September 12, 1972.

has a commercial impression similar to those in plaintiff's marks.⁹

Plaintiff places its mark on all of its goods and uses the mark extensively in advertising and promotional materials -- including nation-wide publications. In the written ad copy made part of the record and on shopping bags, the word "Britches" is frequently used alone to refer to opposer's services. Ms. Gay testified that increasingly opposer's executives discuss BRITCHES alone as an all-encompassing mark for all of its related divisions. In all four pleaded registrations, "BRITCHES" is the dominant component of each mark. Opposer's Registration No. 1,268,646 cover a long listing of clothing items and retail clothing store services, and the subject mark comprises the word "BRITCHES" alone within a rectangular border device.

Thus, after reviewing the record, we find that "BRITCHES" is a strong mark, entitled to broad protection. Plaintiff has used its mark most extensively in the sale and promotion of its goods and services since 1968.

By contrast, applicant readily translates the word "Kinder" as being equivalent to "Children." Hence, to the

⁹ Examine, for example, the pun contained in the "SUNS OF BRITCHES" mark. Marks such as this one evoke connotations that by their very nature arguably tell consumers acquainted with opposer's goods and services that these are not the indicators of an up-scale clothier who has successfully build goodwill around the "BRITCHES" name for more than three decades.

extent the ordinary consumer sees the service mark, "KINDER BRITCHES," she will think this is merely the latest, logical expansion of the retail business of Britches of Georgetowne, this time into separate retail outlets exclusively for the children's market.

As to the duPont factor on the conditions of sale, it seems clear that purchasers of clothing items are ordinary consumers, subject to the carelessness and misimpressions that often accompany impulse purchases.

Opposer has more than a hundred retail outlets spread across much of the United States. However, since it has just reached the west coast and has not yet made inroads into the Pacific Northwest -- an area of the country where applicant has a most limited presence -- we would not expect at the moment to find cases of actual confusion on the part of consumers. However, based upon opposer's growth over the past thirty-plus years, opposer's selling clothing (including items of children's clothing) in the Pacific Northwest under its "BRITCHES" marks would seem to be within its natural zone of expansion. At that future juncture, it is inevitable there would be confusion between these parties claimed marks on their respective goods/services.

Decision: Accordingly, the opposition is sustained and the application for "KINDER BRITCHES and design" is refused.

P. T. Hairston

H. R. Wendel

D. E. Bucher

Administrative Trademark
Judges, Trademark Trial and
Appeal Board